



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

FILED

02-13-07

02:16 PM

Rulemaking Adoption of a General Order
and Procedures to Implement the Digital
Infrastructure and Video Competition Act
of 2006.

R. 06-10-005

**REPLY COMMENTS OF THE DIVISION OF RATEPAYER
ADVOCATES ON THE PROPOSED DECISION
OF COMMISSIONER CHONG**

SINDY J. YUN
Staff Counsel

Attorney for the Division of Ratepayer Advocates

California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Tel.: (415) 703-1999
Fax: (415) 703-4432
E-Mail: sjy@cpuc.ca.gov

William E. Johnston
Senior Analyst

California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Tel.: (415) 703-2256
Fax: (415) 703-4432
E-Mail: wej@cpuc.ca.gov

February 13, 2007

I. INTRODUCTION AND SUMMARY

Pursuant to Rule 14.3(d) of the California Public Utilities Commission's (Commission) Rules of Practice and Procedure, the Division of Ratepayer Advocates (DRA) submits these Reply Comments on Commissioner Chong's Proposed Decision (PD) on a General Order and Procedures to Implement the Digital Infrastructure and Video Competition Act of 2006 (DIVCA). Silence on any particular issue does not represent agreement or disagreement with the arguments associated with that issue.

II. DISCUSSION

A. DRA's Access to Information Is Not Limited by DIVCA.

The PD's limit on DRA's access to information held by the Commission is not consistent with DIVCA and is contrary to Public Utilities (PU) Code § 309.5(e) and Resolution ALJ-195. The Utility Reform Network (TURN) notes that "the PD restricts DRA access to data the Commission will be collecting"¹ forcing it "to jump through hoops to receive access to information..."² While the PD quotes the relevant section of DIVCA, PU Code § 5900(k), it misinterprets that section:

The Division of Ratepayers Advocates *shall* have authority to advocate on behalf of video customers regarding renewal of a state-issued franchise and enforcement of Sections 5890, 5900, and 5950. For this purpose, the division *shall have access to any information* in the possession of the commission subject to all restrictions on disclosure of that information that are applicable to the commission.³

The PD, besides mistakenly replacing "shall" with a "may" when speaking of DRA's access,⁴ misreads the phrase "for this purpose" as somehow limiting DRA access. The statute is clear. For the purposes of meeting its responsibilities regarding renewal of state video franchises and advocacy for enforcement of customer service and consumer protection standards (§ 5900) and for enforcement of anti-discrimination and build-out requirements (§ 5890), DRA shall have

¹ TURN Comments at 10.

² *Id.*

³ PU Code § 5900(k); Emphasis added.

⁴ PD at 189.

access to “any information in the possession of the commission...” The word “any” is conclusive and controlling. Additionally, this access to information is unqualified because it cannot be known in advance what information held by the Commission will be relevant to meeting DRA’s substantial statutory obligations, including all matters associated with renewals of franchises. Nor can anyone other than DRA, in order to meet its responsibilities under DIVCA, determine what information is necessary and relevant for those broad purposes. The statute does not allow the Commission to determine what information in its possession is necessary for DRA to perform its statutorily-mandated tasks. Certainly video franchise holders, including those whose franchises are coming up for renewal, cannot be allowed to be judges in their own cases regarding what information DRA shall have access to.⁵

The PD’s restrictions placed on DRA’s access to information held by the Commission are also inconsistent with PU Code § 309.5(e). This section gives DRA broad authority to obtain information as follows:

The division may compel the production or disclosure of any information it deems necessary to perform its duties from any entity regulated by the commission, provided that any objections to any request for information shall be decided in writing by the assigned commissioner or by the president of the commission, if there is no assigned commissioner.⁶

Lastly, the PD’s interpretation is contrary to Resolution ALJ – 195. ALJ -195 specifically states that “this resolution does not modify the Division of Ratepayer Advocates’ separate information-gathering authority.”⁷ Therefore, the PD’s restraint on DRA’s access to information is not supported by the plain language of DIVCA, PU Code § 309.5(e) or Resolution ALJ-195, and it should be deleted from the PD.

⁵ The California Community Technology Policy Group and Latino Issues Forum Opening Comments (CCTPG/LIF) (at 9) observe: “The PD seems to envision that DRA’s initiation of its legislatively mandated duties be based on gut feelings or psychic ability. This is a direct contravention of § 5900(k)’s requirement that DRA have access to *any* information needed to perform its duties....The only purpose for the PD’s restrictions on DRA’s access to information (*see* PD at 190) seems to be to prevent DRA from doing its job.” (Emphasis in original.)

⁶ PU Code § 309.5(e).

⁷ Resolution ALJ-195, p. 1, fn. 1.

B. The PD’s Unreasonable Prohibition Against DRA’s Ability to File Complaints Should be Eliminated.

The PD states that:

DIVCA expressly gives local government entities, not DRA, the right to file complaints concerning the performance of a company pursuant to Public Utilities Code § 5890. We find that there is no statutory basis for similarly permitting DRA to file complaints. Thus, we will not allow DRA to file complaints concerning the actions of state video franchise holders.”⁸

However, as CCTPG/LIF note “§ 5900(k) explicitly establishes DRA as having ‘authority to advocate on behalf of video service customers regarding ... enforcement of Sections 5890, 5900, and 5950.’”⁹ They conclude: “Without the ability to file complaints, this ‘authority regarding enforcement’ becomes an empty letter.”¹⁰ DRA agrees.

The PD erroneously claims that “there is no statutory basis for... permitting DRA to file complaints.”¹¹ The statutory basis lies in § 5900(k). Filing complaints at the Commission is a tried and true means of advocacy at the Commission. DIVCA does not preclude DRA or anyone else from bringing complaints to the entity which is, in the words of DIVCA, the state’s “sole franchising authority’ for issuing state video franchises.”¹²

C. The Prohibition of Cross-Subsidization After January 1, 2009, Needs to be Addressed in the PD and in Phase II.

As TURN correctly points out, the PD has made no provision for enforcement of DIVCA’s *permanent* prohibition of cross-subsidization of video service by telephone service. TURN notes that “There is nothing in the PD to prevent the URF telephone companies from taking the costs associated with video build-outs and cross-subsidizing them by raising basic rates *after* January 1, 2009....”¹³ The PD apparently relies on the right of “local governments or individual consumers, among others”¹⁴ to bring complaints. But it is extremely unlikely that

⁸ PD at 190.

⁹ CCTPG/LIF Opening Comments at 9-10.

¹⁰ *Id.* at 10.

¹¹ PD at 190.

¹² PD at 3, citing § 5890 – a typographical error for § 5840.

¹³ TURN Opening Comments at 4.

¹⁴ PD at 177.

local governments or individual consumers will have the necessary cost and revenue data—or the authority to compel production of this data-- sufficient to provide the basis for a cross-subsidy analysis and complaint.

Additionally, despite the lack of any record supporting the relevance or adequacy of FCC accounting standards and mechanisms with respect to video cross-subsidization, the PD would rely on just such tools.¹⁵ They are unsuited for that purpose. The PD's casual speculation about what the FCC or others may do cannot assure the California Legislature or California consumers that the strict prohibition against cross-subsidies of § 5940 is being satisfied on a permanent basis by the "sole franchising authority for a state franchise to provide video service under this division." The Commission must take affirmative steps to enforce this aspect of DIVCA along with its other provisions. Language detailing enforcement mechanisms and data gathering procedures for preventing cross-subsidizations should be considered in Phase II and the procedures specifically addressing this prohibition should be in place before price caps on stand-alone residential service are lifted.

D. The Commission's Self-Described "Ministerial" Role Is Inconsistent with Its Responsibilities Under DIVCA.

DRA agrees with the Consumer Federation of California's analysis regarding the inappropriateness of the word "ministerial" to describe the Commission's role and responsibilities under DIVCA.¹⁶ The Commission's DIVCA responsibilities can hardly be described as merely "ministerial." The very length and complexity of the PD itself is evidence that the Commission's responsibilities require analysis and thus are not purely ministerial. Determining the completeness or incompleteness of the information to be supplied regarding the applicant's proposed video service area, which is just one section of the application process -- including as it does census information, geographic information, and socioeconomic information -- can hardly be said to be ministerial. Therefore, the Commission should remove all references to the word "ministerial" in the PD.

¹⁵ Verizon's footnote 62 of its OIR Reply Comments maintains that its non-regulated costs are allocated consistent with FCC Part 64, but *no party* makes the case that this is an adequate mechanism to protect against cross-subsidization, particularly in an environment with uncapped basic residential rates.

¹⁶ CFC Comments, p. 2.

III. CONCLUSION

For the reasons stated above and in our Opening Comments, the Commission should adopt all of our recommendations set forth in our Opening and Reply Comments and modify the PD and the draft General Order accordingly.

Respectfully submitted,

/s/ Cindy Yun

Sindy Yun
Staff Counsel

Attorney for the Division of Ratepayer
Advocates

California Public Utilities Commission

505 Van Ness Ave., Room 4300
San Francisco, CA 94102
Phone: (415) 703-1999
E-mail: sjy@cpuc.ca.gov
Fax: (415) 703-4432

February 13, 2007

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of **“REPLY COMMENTS OF THE DIVISION OF RATEPAYER ADVOCATES ON THE PROPOSED DECISION OF COMMISSIONER CHONG”** in **R.06-10-005** by using the following service:

☒ **E-Mail Service:** sending the entire document as an attachment to an e-mail message to all known parties of record to this proceeding who provided electronic mail addresses.

☐ **U.S. Mail Service:** mailing by first-class mail with postage prepaid to all known parties of record who did not provide electronic mail addresses.

Executed on February 13, 2007 at San Francisco, California.

/s/ Imelda Eusebio
Imelda Eusebio

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address and/or e-mail address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

* * * * *

CALIFORNIA PUBLIC UTILITIES COMMISSION
Service Lists

Proceeding: R0610005 - CPUC - CABLE TELEVIS

Filer: CPUC - CABLE TELEVISION

List Name: INITIAL LIST

Last changed: February 5, 2007

william.weber@cbeyond.net
ann.johnson@verizon.com
drodriguez@strategicounsel.com
maggie.healy@redondo.org
citymanager@longbeach.gov
thause@ci.arcadia.ca.us
ckurtz@cityofpasadena.net
esther.northrup@cox.com
kkirby@mediasportscom.com
bnusbaum@turn.org
elaine.duncan@verizon.com
rcosta@turn.org
barry.fraser@sfgov.org
ijackson@oaklandcityattorney.org
davidjmiller@att.com
fassil.t.fenikile@att.com
syreeta.gibbs@att.com
thomas.selhorst@att.com
enriqueg@lif.org
mschreiber@cwclaw.com
smalllecs@cwclaw.com
wlowery@millervaneaton.com
ahmmond@usc.ed
lex@consumercal.org
jsf@joefaber.com
douglas.garrett@cox.com
grs@calcable.org
js@calcable.org
ll@calcable.org
mp@calcable.org
markr@greenlining.org
pkamlarz@ci.berkeley.ca.us
robertg@greenlining.org
bill.hughes@sanjoseca.gov
g.gierczak@surewest.com
pwhitnell@cacities.org
mmalliet@cwa-union.org
KSaville@czn.com
astevens@czn.com
Ken.Simmons@lacity.org
LELDRID@ATTY.LACITY.ORG

chabran@cctpg.org
Roy.Morales@lacity.org
william.imperial@lacity.org
gfuentes@mminet.com
Kramer@TelecomLawFirm.com
friedman@telecom-mgmt.com
slastomirsky@sandiego.gov
swilson@riversideca.gov
bob.wilson@rdmd.ocgov.com
cmailloux@turn.org
william.sanders@sfgov.org
Jeffrey@asianlawcaucus.org
malcolmy@asianlawcaucus.org
rdeutsch@sidley.com
gstepanicich@rwglaw.com
info@tobiaslo.com
pcasciato@sbcglobal.net
ngielegghem@cwclaw.com
jguzman@nossaman.com
katiensel@dw.com
gxgw@pge.com
wlowery@millervaneaton.com
grant.kolling@cityofpaloalto.org
david.hankin@rcn.net
mark@ci.concord.ca.us
peter@ci.concord.ca.us
thaliag@greenlining.org
smckown@marin.org
bmcc@mccarthy-law.com
holden@gosnc.com
cborn@czn.com
jchico@czn.com
kboyd@nossaman.com
rryan@saccounty.net
sue@buskegroup.com
ayo@cpuc.ca.gov
awn@cpuc.ca.gov
am4@cpuc.ca.gov
jbc@cpuc.ca.gov
jcw@cpuc.ca.gov
mfo@cpuc.ca.gov
leh@cpuc.ca.gov
sjy@cpuc.ca.gov
tjs@cpuc.ca.gov
wej@cpuc.ca.gov
dlh@cpuc.ca.gov
edward.randolph@asm.ca.gov
randy.chinn@sen.ca.gov